

MITCHEL LEE JOSEPH,
Appellant,

v.

STATE OF ALASKA,
Appellee.

Trial Court No. 4TO-18-00068 CR

APPELLANT’S REPLY BRIEF

Michael Horowitz (1005021)
PO Box 652
Kingsley, Michigan 49649
(907) 231-3945

Deputy Clerk

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in the body and footnotes of this document is Century Schoolbook 13 point.

TABLE OF CONTENTS

Table of Authorities	iii
Authorities Relied Upon	iv
Reply	1
A. The State agrees that the trooper violated Joseph’s due process rights by misadvising him that refusal was punishable by a misdemeanor and that the erroneous advisement was plain error.....	1
B. The trooper’s misadvisement that Joseph had the right to refuse the chemical test also violated Joseph’s due process.	1
C. At a minimum, the due process implications of the officer’s misadvisements requires remand.....	4
D. The trial court impermissibly disallowed Joseph’s attempt to cross-examine the trooper about the accuracy of the judgments.....	5
Conclusion.....	6

TABLE OF AUTHORITIES

CASES

<i>Adams v. State</i> , 261 P.3d 758 Alaska 2011).....	4
<i>Graham v. State</i> , 633 P.2d 211 (Alaska 1981).....	3
<i>Gray v. State</i> , 2019 WL 1057395 (Alaska App. Mar. 6, 2019).....	6
<i>Jones-Nelson v. State</i> , 446 P.3d 797 (Alaska App. 2019)	6
<i>Olson v. State</i> , 2015 WL 3648566 (Alaska App. June 10, 2015)	4
<i>Olson v. State</i> , 260 P.3d 1056 (Alaska 2011)	2, 3

STATUTES

AS 11.81.900(b)(19)	5, 6
---------------------------	------

AUTHORITIES RELIED UPON

Alaska Constitution, article I, section 7 - Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Alaska Constitution, article I, section 11 - Rights of Accused.

In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, amendment XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AS 28.35.032. Refusal to submit to chemical test.

(a) If a person under arrest for operating a motor vehicle or aircraft while under the influence of an alcoholic beverage, inhalant, or controlled substance refuses the request of a law enforcement officer to submit to a chemical test authorized under AS 28.33.031(a)(1) or AS 28.35.031(a), or if a person involved in a motor vehicle accident that causes death or serious physical injury to another person refuses the request of a law enforcement officer to submit to a chemical test authorized under AS 28.33.031(a)(2) or AS 28.35.031(g), after being advised by the officer that the refusal will result in the denial or revocation of the driver's license, privilege to drive, or privilege to obtain a license, that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating a motor vehicle or aircraft while under the influence of an alcoholic beverage, inhalant, or controlled substance, and that the refusal is a crime, a chemical test may not be given, except as provided by AS 28.35.035. If a person under arrest for operating a watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance refuses the request of a law enforcement officer to submit to a chemical test authorized under AS 28.35.031(a), after being advised by the officer that the refusal may be used against the person in a civil or criminal action or proceeding arising out of an act alleged to have been committed by the person while operating a watercraft while under the influence of an alcoholic beverage, inhalant, or controlled substance, and that the refusal is a crime, a chemical test may not be given, except as provided by AS 28.35.035.

REPLY

- A. The State agrees that the trooper violated Joseph’s due process rights by misadvising him that refusal was punishable by a misdemeanor and that the erroneous advisement was plain error.**

When Joseph declined to provide a breath sample for the Datamaster, the trooper advised him that his refusal would be a misdemeanor. [Tr. 151] The State agrees that the trooper misadvised Joseph, that the misadvisement violated Joseph’s due process, and that the misadvisement was plain error. [Ae. Br. 4–7] This Court should accept the State’s concession on these points as well-reasoned and consistent with this Court’s and the Alaska Supreme Court’s prior decisions.

- B. The trooper’s misadvisement that Joseph had the right to refuse the chemical test also violated Joseph’s due process.**

The trooper misadvised Joseph that “if you want to decline that’s fine” and that “if you don’t want to then that’s your right.” [Tr. 150] Although the State acknowledges on appeal that “[t]here is no right to refuse a breath test in the statutory sense, in that the arrestee will suffer adverse consequences,” the State argues that the trooper’s misadvisement to Joseph is immaterial. [Ae. Br. 8]

The State’s citation on this point is problematic. In support of its claim that the trooper’s misadvisement about Joseph’s right to refuse was immaterial, the State cites the Alaska Supreme Court’s decision of *Olson v.*

State.¹ [Ae. Br. 8] The State cites *Olson* as explaining that a mistaken reference to a defendant’s “right” to refuse “is largely one of semantics” and “is not material to the outcome of this case.”² [Ae. Br. 8] But the State’s citation to *Olson* is out of context. *Olson*’s discussion of semantics and immateriality was a response to the State’s appellate argument that sought to distinguish a “right” from a “power.”³ The full context of *Olson* on this point is:

B. The Distinction Between A “Right” And A “Power” Is Not Relevant To This Case.

We have stated that there is “no right [to refuse a breath test] in the statutory sense, in that the arrestee will suffer adverse legal consequences.” We have avoided labeling refusal as a “right” because penalties may arise for choosing to refuse a breath test. But this distinction is largely one of semantics; other states recognize a “right” to refuse a breath test and assess legal consequences for exercising that right. The distinction drawn by the State between a “right” and a “power” in the context of refusing to submit to a breath test is not material to the outcome of this case.^[4]

Obviously, the distinction between a “power” and a “right” is not at issue in Joseph’s case. Accordingly, the semantic and immaterial distinction between a “power” and a “right” neither informs the instant appeal nor supports the

¹¹ 260 P.3d 1056 (Alaska 2011).

² *Id.* at 1060–61.

³ *Id.*

⁴ *Id.* (internal citations omitted) (alterations and quotations original).

State's argument that the trooper's misadvisement that Joseph had the right to refuse "is not actionable."

Other than its problematic citation to *Olson*'s rejection of an unrelated argument, the State does not address the issue presented by the trooper misadvising Joseph that "if you want to decline that's fine" and that "if you don't want to then that's your right." [Tr. 150; Ae. Br. 8–9] In doing so, the State fails to address that this misadvisement independently offended Joseph's due process rights by 1) failing to clear up (or rather, contributing to) any misunderstanding of Joseph's rights contributing to his refusal as required by the Alaska Supreme Court's decision in *Graham v. State*,⁵ and 2) by again impairing Joseph's "ability to make an informed decision about potential consequences flowing from his refusal" by providing Joseph with additional misinformation.⁶

The officer misadvised Joseph about having a right to refuse the breathalyzer. Joseph did not have a right to refuse the breathalyzer. The State did not meaningfully address this obvious error.

⁵ 633 P.2d 211, 215 (Alaska 1981).

⁶ *Olson*, 260 P.3d at 1061.

C. At a minimum, the due process implications of the officer’s misadvisements requires remand.

The State argues that the officer’s misadvisements require a remand to determine prejudice. The State appears to be correct that the Alaska Supreme Court’s decision in *Olson* requires remand. There, addressing an officer’s misadvisement about the lookback period for felony DUI, the court held that “We join those jurisdictions holding that under these circumstances the arrestee must prove that he or she was prejudiced by the mistake” and remanded Olson’s case where he then failed to prove prejudice.⁷

However, *Olson*’s result seems contradictory to the established rule that the State bears the burden of proving that constitutional errors are harmless beyond a reasonable doubt.⁸ *Olson* does not appear to have overruled that law. The State concedes that the trooper’s misadvisement violated Joseph’s rights to due process. Joseph respectfully submits that the State bears the burden to prove that this constitutional violation was harmless beyond a reasonable doubt.

⁷ *Id.* at 1064; *Olson v. State*, 2015 WL 3648566, at *2–3 (Alaska App. June 10, 2015) (unpublished).

⁸ *See Adams v. State*, 261 P.3d 758, 773 (Alaska 2011) (explaining that “constitutional violations are always prejudicial unless the State proves they are harmless beyond a reasonable doubt, while other errors are only prejudicial if the defendant proves that the error appreciably affected the outcome”); *Phetamphone v. State*, 2020 WL 6305972, at *4 n.10 (Alaska App. Oct. 28, 2020) (discussing *Adams*).

D. The trial court impermissibly disallowed Joseph’s attempt to cross-examine the trooper about the accuracy of the judgments.

Joseph sought to cross-examine the trooper about the accuracy of the judgments. [Tr. 327–32] The trial court disallowed cross-examination on this point unless Joseph could produce some evidence that the judgments were inaccurate. [Tr. 327–32] This resulted in a textbook reversal of the burden of proof and Joseph’s rights to cross-examination.

On appeal, the State cites the definitions in AS 11.81.900 to argue that Joseph’s attempt to cross-examine the prior judgments was a “defense,” and therefore Joseph was required to present some evidence before he could cross-examine on the State’s evidence. This proposition is completely untenable and also misconstrues “defense” in the meaning of that statute.

The State’s proposition is completely untenable because the State’s interpretation of AS 11.81.900 requires a defendant to present some evidence before cross-examining any of the State’s evidence. The constitutions of the State of Alaska and United States of America do not require defendants to present some evidence to exercise their explicit and unambiguous constitutional rights to cross-examination. The State’s proposition misconstrues “defense” as defined by AS 11.81.900(b)(19) because that statute

relates to defenses such as self-defense and heat-of-passion.⁹ Here, to the extent that Joseph was defending his case, he was not presenting a defense within the meaning of that statute, and to hold otherwise would result in the creation of a “reasonable doubt defense” or “cross-examination credibility defense” that require defendants to produce some evidence before exercising their state and federal constitutional rights. Furthermore, the State’s interpretation of AS 11.81.900(b)(19) would seem to require defendants to present some-evidence before being entitled to the instruction that the State must prove all elements beyond a reasonable doubt.

Defendants are plainly not required to present evidence to cross-examine the State’s evidence. Joseph could obviously cross-examine the trooper about whether he had personal knowledge of the judgments pursuant to Joseph’s right to confrontation under the state and federal constitutions.

CONCLUSION

The parties agree that misadvising Joseph about the consequences of his refusal amounted to plain error and the violation of Joseph’s due process

⁹ See, e.g., *Jones-Nelson v. State*, 446 P.3d 797, 801 (Alaska App. 2019) ([T]he “some evidence” test governs the question of whether a defendant is ultimately entitled to have the jury instructed on self-defense at the end of the trial.”) (citing AS 11.81.900(b)(19)); *Gray v. State*, 2019 WL 1057395, at *2–3 (Alaska App. Mar. 6, 2019) (unpublished) (citing AS 11.81.900(b)(19) while examining whether defendant presented some evidence to support heat-of-passion defense).

rights. At a minimum this requires a remand, but if this Court applies the proper standard for constitutional error, the Court should reverse Joseph's conviction unless the State proved that it was harmless beyond a reasonable doubt, which it failed to do. This Court should also reverse Joseph's conviction for the trial court's violation of his right to cross-examination.

DATED at Kingsley, Michigan, this 15th day of November 2021.

LAW OFFICE OF MICHAEL HOROWITZ
UNDER CONTRACT WITH THE PUBLIC DEFENDER AGENCY

/S/ Michael Horowitz
MICHAEL HOROWITZ
ALASKA BAR NO. 1005021